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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 MELISSA TUCKER, et al.,  
4 Plaintiffs,

5 v.

11CV4907(AKH)

6 EAST SIDE DD LLC, et al.,  
7 Defendants.

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8 New York, N.Y.  
9 January 20, 2012  
11:15 a.m.

10 Before:

11 HON. ALVIN K. HELLERSTEIN

12 District Judge

13 APPEARANCES

14 PELTON & ASSOCIATES  
15 Attorneys for Plaintiffs  
16 BRENT PELTON  
17 TAYLOR GRAHAM  
18 NICK MAXWELL

19 KASOWITZ BENSON TORRES & FRIEDMAN  
20 Attorneys for Defendants  
21 DANIEL TURINSKY  
22 JULIA DiPRETE  
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1 (Case called)

2 THE COURT: I asked you in because I wanted to discuss  
3 with you a plan for going forward. We have an amended class  
4 and collective action for the plaintiffs that stands us. I  
5 don't know if it has been answered yet. It pleads a collective  
6 action under the United States laws under the Fair Labor  
7 Standards Act. Does it also plead state causes of action for a  
8 class action.

9 MR. PELTON: Yes, it does, your Honor; it pleads two  
10 separate class actions.

11 THE COURT: You need to certify this.

12 MR. PELTON: Yes. Plaintiffs would like to move  
13 quickly towards certification. We would like to get our  
14 initial discovery demand sent out within the next approximately  
15 ten days.

16 THE COURT: Have you discussed this with defendants.

17 MR. PELTON: We have had several calls. We prepared a  
18 proposed schedule. Plaintiffs' proposed schedule begins class  
19 certification by April 20.

20 THE COURT: Have you agreed on a schedule.

21 MR. PELTON: No, we have not.

22 THE COURT: Why not.

23 MR. PELTON: Because plaintiffs would like to get the  
24 motion filed as quickly as possible and defendants' schedule  
25 anticipates more discovery and they have a filing date of

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1 August 1.

2 THE COURT: That's much too long, Mr. Turinsky, that's  
3 too long. What kind of discovery do you need.

4 MR. TURINSKY: The disagreement we had with Mr. Pelton  
5 was whether discovery --

6 THE COURT: Answer my question.

7 MR. TURINSKY: We need to depose the named plaintiffs;  
8 there are three named plaintiffs. We also need to depose  
9 Shaunta Brown, a former payroll manager who submitted a  
10 declaration in connection with the initial and amended  
11 complaint. I believe those are the depositions we will need in  
12 advance of the class certification motion.

13 THE COURT: That should take two weeks.

14 MR. TURINSKY: I don't know if plaintiffs have much of  
15 any documents but we will need documents relating to the  
16 certification issues under Rule 23 in advance of the  
17 certification motion.

18 (Pause)

19 THE COURT: Mr. Pelton, what date do you want for a  
20 class certification motion to be filed.

21 MR. PELTON: Plaintiffs feel that we can file our  
22 motion by April 1, so long as we get the payroll records,  
23 compilations, declarations and copies of checks, I am sorry,  
24 April 20, so long as we can get the discovery that we need.

25 THE COURT: I don't think you need until April 20. It

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1 seems to me you can complete written discovery by February 10,  
2 take depositions the balance of February, and motions for  
3 certification of classes can take place March 16.

4 I want to give you this view as it were of my  
5 attitudes on class certifications. Contrary to what I wrote in  
6 *Ansoumana v. Gristedes*, I have come to the view that there is  
7 not much room for a Rule 23 class in connection with the Fair  
8 Labor Standards Act complaint. My view is that there is much  
9 more time and effort in a Rule 23 class and that that and other  
10 proceedings tend to derogate from what I have to do to  
11 implement the federal law. So, a word to the plaintiffs'  
12 lawyers, you are not likely to succeed a Rule 23 certification.

13 However, in the nature of pleading, your named  
14 plaintiffs have to plead all their claims in one lawsuit. They  
15 will be pleading their claims under New York labor law as well  
16 as the federal claims. So, we should get through very quickly  
17 the whole notion of certifications.

18 If you go along with that view, you should be on your  
19 way to substantive discovery, Mr. Pelton. I would think  
20 Mr. Turinsky would find it in his interests also to agree to  
21 certification of a federal class which would be an opt-in class  
22 without going through the labor of discovery to any great  
23 degree and both of you can get involved in merit discovery very  
24 quickly.

25 In any event, whatever motions you make for class

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1 certification must be made by March 16, oppositions by April  
2 13, reply by April 24. Off the record.

3 (Discussion off the record)

4 THE COURT: Let me change that. March 16 for filing  
5 motions, April 20 for oppositions, and May 1 for reply. I  
6 would hope you would agree on a Section 42 opt-in class.

7 Tell me about the case.

8 MR. PELTON: Yes, your Honor. We represent three  
9 employees who work for East Side Dunkin' Donuts. East Side  
10 Dunkin' Donuts owns 28 Dunkin' Donuts franchises within  
11 Manhattan.

12 THE COURT: Louder.

13 MR. PELTON: Our clients are three former employees of  
14 Dunkin' Donuts.

15 THE COURT: I heard what you said.

16 MR. PELTON: They worked as crew members, assistant  
17 managers and managers. We have two classes of claims here, one  
18 on behalf of the assistant managers and managers which these  
19 people were required to work about 55 to 60 hours a week and  
20 were paid on an alleged salary basis.

21 THE COURT: Do you believe they would be entitled to  
22 overtime.

23 MR. PELTON: Yes, we do, your Honor.

24 THE COURT: Do you believe the managers would be  
25 entitled to overtime.

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1 MR. PELTON: Yes, we do, because we believe that they  
2 failed the salary basis test cited.

3 THE COURT: Do you think there might be an  
4 inconsistency between suing for crew members and assistant  
5 managers and managers.

6 MR. PELTON: No, I do not, your Honor.

7 THE COURT: Mr. Turinsky, is there a split in the law  
8 on managers versus assistant managers that you are going to  
9 bring on.

10 MR. TURINSKY: I think there is a distinction between  
11 managers and assistant managers in terms of whether or not they  
12 are exempt. That's one the factors that will go into why this  
13 shouldn't be a class in terms of the exemption status. But in  
14 terms of managers and assistant managers, yes, your Honor.

15 THE COURT: My view is that that may play a part when  
16 there might be a settlement discussion. I don't think it plays  
17 much of a role in terms of conflicts in Mr. Pelton's ability to  
18 represent everybody for purposes of litigation. We may in the  
19 future have to have a subclass and maybe even separate lawyers.  
20 That's something we can discuss in the future.

21 MR. PELTON: OK.

22 THE COURT: That's in opposition to class  
23 certification. I think you ought to save it, Mr. Turinsky; you  
24 make a decision on that. I am given to making these  
25 pronouncements and sometimes I change my mind. But I think

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1 it's a guide to you in terms of where you want to direct your  
2 efforts in this case.

3 MR. TURINSKY: Thank you, your Honor.

4 MR. PELTON: The managers and assistant managers were  
5 paid on an alleged salary basis subject to deductions if they  
6 did not work the full number of hours that week.

7 THE COURT: You have alleged a claim against a number  
8 of East Side Dunkin' Donuts; are they all under common  
9 management.

10 MR. PELTON: Yes, they are.

11 THE COURT: The individuals that you named are the  
12 managers.

13 MR. PELTON: The owners and managers.

14 THE COURT: Why do you allege John Does.

15 MR. PELTON: Those are the corporate entities that we  
16 don't know their names. Each of the Dunkin' Donuts locations  
17 are set up under a separate corporate entity.

18 THE COURT: What you want are all the Dunkin' Donuts  
19 owned by Mr. Bronfman, Mr. Geva, and Mr. Shapiro.

20 MR. PELTON: Absolutely.

21 THE COURT: Are you able to give that, Mr. Turinsky.

22 MR. TURINSKY: I am sure that --

23 THE COURT: One way or another Mr. Pelton will get it.

24 MR. TURINSKY: I am sure it shouldn't be a problem  
25 identifying which Dunkin' Donuts are owned by Mr. Bronfman. I

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1 don't believe Mr. Shapiro is an owner. I don't believe  
2 Mr. Geva is an owner. These plaintiffs didn't work for all of  
3 those entities; they worked for a few different entities,  
4 certainly not all of them. I don't know if they are all  
5 appropriately part of this. I don't know if all of them are  
6 necessarily relevant to this case. I can certainly get  
7 information from individuals as to what --

8 THE COURT: You are not going to be able to make a  
9 claim, Mr. Pelton, unless you have a worker; you have three  
10 workers now.

11 MR. PELTON: These workers worked for the common  
12 enterprise. They worked for probably 12 to 15 of the different  
13 store locations within the enterprise. Under the Fair Labor  
14 Standards Act you look at the overall enterprise or business.

15 THE COURT: In my view, Mr. Turinsky, you should give  
16 the information. We can work out later who should be a proper  
17 defendant.

18 MR. TURINSKY: I appreciate that.

19 THE COURT: What else.

20 MR. PELTON: The store managers were paid on a salary  
21 basis, the assistant managers also on the alleged salary basis.  
22 Their job duties we do not believe meet any of the executive  
23 exemptions, so these people would be exempt.

24 THE COURT: You need to exchange all the relevant  
25 documents that Mr. Turinsky's clients have.



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1 I learned this from the late Judge Milton Pollack.  
2 Interrogatories and Rule 34 requests are largely a waste of  
3 time. Each should give your files, holding back whatever is  
4 privileged. You've got manuals, Mr. Turinsky, you've got pay  
5 records, you've got job descriptions, other things that are  
6 important to your case, the sooner you give it, the less  
7 trouble, the sooner we can get into the merits and save your  
8 client a great deal of money. You know what is relevant, both  
9 of you, just do it. You don't need Rule 34 requests. Just  
10 exchange your files. Pick a date it's convenient. Do it.

11 MR. PELTON: The crew member class has claims for  
12 unpaid overtime which involved shaving of hours and shifting of  
13 hours from one week to the next. They also have spread of  
14 hours claims under labor New York labor law and they have the  
15 gratuity claim.

16 THE COURT: What is spread of hours.

17 MR. PELTON: Under New York labor law, if you work a  
18 split shift or more than 10 hours on any day, you are entitled  
19 to an extra hour at minimum wage for that 10-hour day.

20 THE COURT: What is a split shift; if you work on the  
21 tail end of one shift it comes into the next shift.

22 MR. PELTON: Say you work from 6 until 10 then from 2  
23 until 4. They also have the gratuity claim. Each of the  
24 Dunkin' Donuts locations had a tip cup where customers put  
25 change and dollar bills in the tip cup. Contrary to what

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1 customers would expect, that money was deposited in East Side  
2 DD's bank account and at the end of the week, the full-time  
3 employees would receive \$20, the part-time employees would  
4 receive \$5.

5 THE COURT: All of this alleged in the complaint.

6 MR. PELTON: Yes.

7 THE COURT: I got the picture.

8 MR. TURINSKY: That's an accurate recitation of the  
9 allegations in the complaint. We certainly deny that employees  
10 were not properly paid overtime.

11 THE COURT: I assume.

12 MR. TURINSKY: We certainly deny the allegations. We  
13 certainly do not think this is an appropriate class.

14 THE COURT: It's an appropriate Section 42 claim.

15 MR. TURINSKY: I was referring to the Rule 23 class.

16 THE COURT: You are likely to win on that issue.

17 MR. TURINSKY: Unless your Honor has any specific  
18 questions, I think your Honor understands.

19 THE COURT: The spread of hours will be an issue for  
20 individual claims not for the class.

21 MR. TURINSKY: I think that's correct.

22 THE COURT: OK. If there are disputes, see Rule 2(e)  
23 in my individual rules which requires a joint letter putting  
24 the dispute before me and I will give you a pretty quick  
25 turn-around on resolving the dispute.

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1 We have the dates; we will move from here.

2 Thank you.

3 MR. PELTON: Thank you, your Honor.

4 MR. TURINSKY: Thank you, your Honor.

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